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IN THE SUPREME COURT OF THE UNITED STATES

NO. 1109

EUGENE J. MARSHALL, MARION FRANCIS FOUNTAIN and ROOSEVELT TREMBLE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DONALD WHEELER JONES
DuPont Plaza Center
Miami, Florida

LEONARD R. MELLON
600 Concord Building
Miami, Florida 33130

EUGENE TANNENBAUM
Biscayne Building
Miami, Florida

COUNSEL FOR PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES

NO._____

EUGENE J. MARSHALL, MARION FRANCIS FOUNTAIN and ROOSEVELT TREMBLE,

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UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on August 9, 1967; petition for rehearing denied on January 8, 1968.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals dated August 9, 1967, is printed in Appendix B hereto, infra, and is as yet unreported.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on August 9, 1967 (App. B & C, infra, pp. 11 - 12). Rehearing was denied on January 8, 1968 (App.D, infra, p 13). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

DID THE WIRETAPPING AND RECORDING OF PETITIONERS' CONVERSATIONS BY LAW ENFORCEMENT OFFICERS AND THE USE OF A "BUG" OR MONITORING DEVICE TO EAVESDROP ON OTHER CONVERSATIONS OF THE PETITIONERS, ALL OF WHICH WAS ACCOMPLISHED WITHOUT A SEARCH WARRANT OR OTHER PRIOR JUDICIAL SANCTION, CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE CONTRARY TO THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

WERE THE PETITIONERS DEPRIVED OF THE ELEMENTS OF A FAIR AND IMPARTIAL TRIAL WHEN THE TRIAL COURT ADMITTED INTO EVIDENCE PROCESSED TAPE RECORDINGS OF TELEPHONE CONVERSATIONS HAD BETWEEN THE PETITIONERS AND THEIR CHIEF ACCUSER WHICH IT PERMITTED THE JURY TO LISTEN TO WHILE THEY FOLLOWED THE CONVERSATIONS WITH A WRITTEN TRANSCRIPT?

WERE THE PETITIONERS DEPRIVED OF THEIR RIGHT TO CONFRONT WITNESSES AGAINST THEM GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN THE TRIAL COURT ALLOWED THEIR CHIEF ACCUSER TO REFUSE TO SUBMIT TO A FULL CROSS-EXAMINATION BY INVOKING THE PRIVILEGE AGAINST SELF-INCRIMINATION?

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affimration, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioners were charged in the United States District Court for the Southern District of Florida in a five count indictment with conspiring to violate 26 U.S.C. 4704(a) and 4705(a) (governing the illegal sale or distribution of narcotic drugs and 18 U.S.C. 201(b) (covering bribery of a public official). Additionally, petitioner Marshall was charged with four counts of violating 18 U.S.C. 201(c) (governing soliciting and accepting bribes) and in that connection petitioners Fountain and Tremble were charged as aiders and abetters of Marshall (R 1-9).

The government's chief witness at trial was one Holston J. Newbold, a convicted narcotics violator and felon (R162: Tr 51, 177-181), who testified that he paid the petitioners sums of money for

which he was to be afforded protection from arrest in his illegal narcotics operations (R162: Tr 10 et seq).

After Newbold reported the alleged transaction to the City of Miami Police Department, officers from that department, without securing a search warrant, installed, with Newbold's permission, a tap or monitoring device on the telephone in his apartment (R163: Tr 696-700). The tap operated from the power circuit of the telephone and was connected to a tape recorder which recorded any conversations over the phone (R163: Tr 701).

In the period between April 15, 1965, the date of the installation of the tap and April 20, 1965, the date of petitioners arrest, numerous calls between the petitioners and Newbold were monitored and recorded. The majority of these calls were between Newbold and Marshall, with two occurring between Newbold and petitioner Fountain and two between Newbold and Tremble (R162: Tr 138, 712-715). The calls from Newbold to Marshall were either to Marshall's home or to his office. The calls by Marshall to Newbold were usually made from Marshall's home or office (R162: Tr 838-901).

On April 20, 1965, officers installed a listening device in Newbold's apartment which they monitored in an adjoining apartment and by which they were able to monitor and tape certain conversations had that day between Newbold and the petitioners (R163: Tr 793-799).

The tape recordings in question were taken by the officers to the United States Army Broadcast Studios in Washington where the tapes were processed and copies made of them after the tapes had been run through a noise suppressor (R162:TR 722A-722M). The trial court over petitioners' objections, allowed the original tapes of said telephone conversations and the expurgated, processed tapes to be admitted into evidence, and also permitted the jury to look at copies of the transcripts while the tapes were being played (R163: Tr 834). Although

the court did not allow into evidence the tapes made in Newbold's apartment on April 20, 1965 between him and the petitioner, it did permit the officers who heard the conversations through use of the eavesdropping device to testify about them (R163: Tr 917-923, 977-979, 987-1000).

On cross-examination of Newbold an attempt was made to elicit from him the source of his income generally and specifically, the source of a portion of the money allegedly paid by him to the petitioners. In both instances the trial court sanctioned Newbold's refusal to answer such questions by permitting him to invoke his privilege against self-incrimination (R162: Tr 174-176, 218-219).

The Court of Appeals considered the questions presented to it concerning the said restriction on cross-examination, the use of the recorded telephone conversations and the Fourth Amendment question as to the use of the said monitoring devices. The court affirmed the judgment of the trial court, holding in connection with the Fourth Amendment question that an "unreasonable" search had not occurred in the instant case.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Petitioners rely upon the following reasons why the petition for writ of certiorari shouldbe granted in this case:

1. The decision of the court of appeals in this case —— holding that the tapping and monitoring of petitioners telephone conversations without a search warrant did not constitute an unreasonable search ——conflicts with this Court's decision in Katz v United States, ____U.S.____, 88 S. Ct._____, 19 L. Ed 2d 576.

In ruling as it did on this question, the Court of Appeals quoted its own opinion in Blanchard v United States,(5thCir) 360 F 2d 318,320 to the effect that "listening to a telephone conversation

between an informant (who gave his consent to the 'listening')and the appellant by a Government agent is not such an invasion of a constitutionally protected area as to be a violation of the Fourth Amendment." The court further said that this Court's decision in Berger v New York, ____U.S. ____, ____S. Ct.____ 18 L. Ed 2d 1040, did not compel a different conclusion than the one reached by it. The lower court found especially compelling this Court's citation of Lopez v United States, 373 U.S.427, 83 S. Ct. 1381, 10 L. Ed 2d 462 in Berger,supra. Thus it says at page 11 (Appendix B, infra):

> "The Court's citation with approval of Lopez v United States, 373 U.S. 427, 83S.Ct. 1381, 10 L. Ed 2d 462 (1963) makes clear that Berger was not meant to hold unreasonable the interception of a telephone conversation with the permission of one party where there has been no unlawful physicial invasion of a constitutionally protected area."

Thus the lower court has resorted to the concept of the "constitutionally protected area" as the very "talismanic solution" which this court in Katz v United States, supra, has said it never suggested as a "solution to every Fourth Amendment problem," 19 L. Ed 2nd at 582, and which concept this court found as no longer at all controlling when it said at page 583:

> "...[O]nce it is recognized that the Fourth Amendment protects people —— and not simply 'areas' —— against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."

The eavesdropping and recording of the telephone conversations of the petitioners and the monitoring of other conversation had by them represented a violation of their privacy and clearly constituted a "search and seizure" under the Fourth Amendment. Since the eavesdropping in question was conducted without a seach warrant, the search and seizure did not comply with constitutional standards.

The instant case manifestly does not fall within any of the "specifically established and well delineated exceptions" spoken of by this court in Katz in which a search could be conducted "outside the judicial process," 19 L Ed 2d 585. Accordingly, the search, conducted as it was without the prior approval of a judge or magistrate, was per se unreasonable under the Fourth Amendment. Id. The petitioners certainly must be included among those spoken of by this Court in Katz, 19 L. Ed 2d at 586:

> "..Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored 'the procedure of antecedent justification... that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed."

2. Important and substantial issues of federal constitutional law are here presented concerning: (a) the elements of a fair and impartial trial and, (b) the right of a defendant in a criminal trial to full and complete cross-examination of the chief witness against him.

a. The tape recordings made of the monitored telephone conversations of the petitioners were processed through a "noise suppressor" at the United States Army Sound Laboratory in Washington, D.C., and filtered copies of the tapes made from the originals. The filtered tapes were admitted into evidence, and copies of a written transcript (prepared by an officer, Lt. Gracey, who had worked on the case) of the conversations contained therein, was furnished the jury at the time the tapes were played.

It was argued inter alia, both at trial and in the Court of Appeals that the use of the transcripts by the jury in conjunction with the tapes served to unduly emphasize that portion of

the prosecution's case. In disposing of this contention the Court of Appeals said at pages 13, et seq (Appendix B, infra):

> "...The jury was, somewhat belatedly, instructed to use the transcript for the limited purpose of identifying the voices. But, it is asserted it nevertheless was error to permit use of the transcripts, however accurate they may have been, because this amounted to a prejudicial emphasis of the conversations, i.e., the cumulative effect of transcripts plus tape so emphasized the conversations that their probative value was inflated in the minds of the jurors. The task of the District Court was to weigh the danger of such over-emphasis against the inconvenience and confusion of stopping the tape between each speaker and permitting Lt. Gracey to identify the next speaker. We cannot say that he arrived at the wrong balance."

There is a decided distinction between the instant case and the Hall decision. Lt. Gracey, who admittedly knew the voices on the tapes intimately, had to repeatedly replay the tapes (R163: Tr 714-715) in order to prepare the transcript. Such being the case, it could not be expected that the jurors, strangers to the voices, could accurately comprehend the conversations on just one hearing. Obviously they could not, and the transcript served — not the stated purpose of identifying voices — but that of furnishing evidence not otherwise admissable. This is clearly established by the fact that the jury sought the use of the transcript while in the course of its deliberations. Thus the present case can be further distinguished from Hall, because when the jury began its deliberations below it firmly believed that the transcript was in fact in evidence. Such was not the case in Hall.

b. The chief witness for the government below was the said Holston Newbold. On cross-examination he was questioned as to the source of the money that he used to travel to Kentucky, New Jersey, Canada and other places. He was also asked, in the course of the cross-examination, how he had obtained the money to make the

initial payment for the protection from arrest about which he had testified on direct examination. In both instances the trial court permitted Newbold to invoke his privilege against self-incrimination.

The Court of Appeals held that the first invocation of the privilege concerned a "collateral" matter, which had not been brought out on direct examination. It therefore reasoned that Newbold had not waived the privilege.

In ruling on the second invocation of the privilege, the Court of Appeals held that under the "plain error rule" (raised because petitioners had not requested the trial court to rule on the witness's refusal to answer) no substantial rights of the petitioners had been affected. In so doing, the court said at page 6 et seq (Appendix B, infra):

> "...Since the source of the money was not placed directly in issue, the inquiry was collateral. The proposed inquiry was one which, if permitted, could only have established the basis for the first of a long series of inferences necessary to reach a conclusion directly related to the issues in the case. In addition, the introduction by the prosecution of the bank's records, showing the existence of the account and a withdrawal of $800 at the time Newbold's testimony indicated the withdrawal occurred, suggests — but does not conclusively establish — that the inquiry would have been of minimal value."

Since the petitioners were charged with accepting bribes in the form of payments of money, a question as to the source of such money was a "direct" one and not "collateral." It was error for the Court of Appeals to conclude that the proposed inquiry "could only have established the basis for the first of a long series of inferences necessary to reach a conclusion directly related to the issues in the case." Id.

All that was necessary to defeat a conviction in this case was for one juror to firmly fix in his mind and to vote upon his convic-

tion that Newbold lied about having the $1,000.00 required for the initial payment and that therefore he did not make the payment about which he had testified on direct examination. Such an inference could have been reached through cross-examination regarding the bank account. The Court of Appeals admitted as much in detailing at footnote 3, page 7, "[t]he line of logical inferences" which might have been possible if full cross-examination had been allowed the petitioners.

CONCLUSION

Based on the foregoing reasons and citation of authority, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD R. MELLON
600 Concord Building
Miami, Florida 33130

DONALD WHEELER JONES
DuPont Plaza Center
Miami, Florida

EUGENE TARRENBAUM
Biscayne Building
Miami, Florida

COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this 9th day of February, 1968, by mailing airmail postage prepaid to The Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and by first class postage to the Honorable Aaron A. Foosaner, Assistant U.S. Attorney, P.O. Box 1070, Miami, Florida.

By _____
LEONARD R. MELLON

APPENDIX A

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23220

MARION FRANCIS FOUNTAIN and ROOSEVELT TREMBLE,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 23238

EUGENE J. MARSHALL,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(August 9, 1967.)

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Before WISDOM and GODBOLD, Circuit Judges and McRAE, District Judge.

GODBOLD, Circuit Judge: Appellants were law enforcement officers assigned to duties in Miami relating to narcotics enforcement.[1] All were charged in a five-count indictment with conspiring to violate 26 U.S.C.A. 4704(a) and 4705(a) (illegal sale or distribution of narcotic drugs) and 18 U.S.C.A. 201(b) bribery of public official). In addition, Marshall was charged with four substantive counts of violating 18 U.S.C.A. 201(c) (soliciting and accepting bribes) and Fountain and Tremble were charged with aiding and abetting Marshall. Pleas of not guilty were entered, and a jury verdict of guilty on all counts was returned. All three now appeal, urging two primary grounds for reversal. We affirm.

1. Restriction of right to cross examination.

The government's principal witness was Holsten James Newbold, named in the indictment as a co-conspirator but not indicted. Newbold testified to a series of transactions implicating all three appellants in a scheme to provide him with protection in his illicit narcotics operations in return for payments. Appellants urge that their cross examination of Newbold was erroneously restricted.

On cross examination there was testimony that after the arrest of appellants Newbold had traveled

[1] Eugene J. Marshall was Agent-in-Charge of the Miami office of the Federal Bureau of Narcotics. Marion Francis Fountain was a sergeant, and Roosevelt Tremble an officer, of the Miami Police Department.

to Kentucky, New Jersey, Canada and several other places. When asked the source of the money that enabled him to travel so extensively, Newbold declined to answer and when questioned by the court indicated that the answer might tend to incriminate him.

On direct examination of Newbold it had been developed that in order to make the initial protection payment he had asked his wife to withdraw money from a bank account. On cross examination Newbold was asked, "How had you come about this money to start with?" He again refused to answer on Fifth Amendment grounds; no specific objection was made, and the court was not asked to rule upon the legitimacy of this refusal to answer.

There is involved here a conflict between the Sixth Amendment right of a criminal defendant to confront witnesses against him, which includes the right to effective cross examination,[2] and the Fifth Amendment right of a witness to decline to give answers which subsequently might be used against him. In resolving this conflict, the courts have made two inquiries: whether the witness may properly invoke the privilege on cross examination, and if so, whether in view of the restriction on cross exami-

[2] While it is often stated that the scope of cross examination is within the discretion of the trial judge, we have made clear that this discretionary authority to limit cross examination comes into play only after there has been permitted as a matter of right sufficient cross examination to satisfy the Sixth Amendment. *Grant v. United States*, 368 F.2d 658 (5th Cir., 1966); *Dixon v. United States*, 333 F.2d 348 (5th Cir., 1964).

nation this necessitates, his testimony on direct may nevertheless go to the jury.

If on direct a witness testifies to incriminating matters, he is considered to have waived the privilege as to those matters and may not, on cross, decline to answer questions as to details of the matters he has already revealed. *Rogers v. United States*, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951). See also *Montgomery v. United States*, 203 F.2d 887 (5th Cir., 1953). However, if the testimony sought to be elicited on cross is not merely a more detailed inquiry into matters as to which the witness already has waived his right, the witness may invoke the privilege.

Where the privilege is legitimately invoked by a witness during cross examination, all or part of that witness's direct testimony may be subject to a motion to strike. The ultimate inquiry is whether the defendant has been deprived of his right to test the truth of the direct testimony. *United States v. Cardillo*, 316 F.2d 606, 611 (2d Cir.), cert. denied, 375 U.S. 822, 84 S.Ct. 60, 11 L.Ed.2d 55 (1963). If he has, so much of the direct testimony as cannot be subjected to sufficient inquiry must be struck. The distinction is generally drawn between invoking the privilege as to "collateral matters," not requiring the striking of direct testimony, and invoking it as to "direct" matters. *United States v. Cardillo, supra*, 316 F.2d at 613. See also *Coil v. United States*, 343 F.2d 573 (8th Cir.), cert. denied, 382 U.S. 821, 86 S.Ct. 48, 15 L.Ed.2d 67 (1966); *Smith v. United States*, 331 F.2d 265 (8th Cir.),

cert. denied, 379 U.S. 824, 85 S.Ct. 49, 13 L.Ed. 34, (1964); *United States v. Collier*, 362 F.2d 135 (7th Cir., 1966), cert. denied, 385 U.S. 977, ... S.Ct. ...., ... L.Ed.2d .... (1967). But the line between "direct" and "collateral" is not clear and the question in each case must finally be whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness's direct testimony.

Here, the first assertion of the privilege involved a matter not covered on direct examination; no inquiry had been made on direct into Newbold's activities after the arrest of appellants. There was, therefore, no waiver of the privilege and it was properly invoked by Newbold. In view of the collateral nature of the inquiry thereby foreclosed, it was not error to permit the direct testimony to go to the jury.

The second invocation of the privilege presents a more difficult matter. Here again we feel that the privilege was properly invoked; while the making of the initial payment and the withdrawal from the account were covered on direct examination, this cannot be construed as a waiver of the right to decline to reveal potentially incriminating information as to the source of the money in the account. Appellants now urge, however, that if permitted to pursue the inquiry, they would have been able to demonstrate that Newbold did not in fact have the money to make the payments he testified to having made; thus it is

urged that the jury was improperly permitted to consider Newbold's direct testimony as to the payments. This objective of the questions propounded on cross was not revealed to the district judge, however, and counsel did not pause long enough in his cross examination to request that the court rule on the witness's refusal to answer. Nor was a motion to strike the direct testimony made. Since the district court was neither apprised of the purpose of the inquiry nor asked to rule on the matter or to strike the direct testimony, the situation cannot require reversal, *United States v. Sanchez*, 361 F.2d 824 (2nd Cir., 1966), *Policyholder's National Life Ins. Co. v. Harding*, 147 F.2d 851 (8th Cir., 1945), *Traylor v. Pickering*, 324 F.2d 655 (5th Cir., 1963), unless it amounts to "plain error" within the meaning of Fed. R. Crim. P. 52(b).

We have made clear that "the plain error rule . . . is not to be used where substantial rights are not affected . . . and the appellant has not been deprived of any substantial right." *Cook v. United States*, 320 F.2d 258, 260 (5th Cir., 1963). In this case inability to inquire into the source of the funds did not deprive appellants of the right to test the truthfulness of Newbold's direct testimony in any substantial way. Since the source of the money was not placed directly in issue, the inquiry was collateral. The proposed inquiry was one which, if permitted, could only have established the basis for the first of a long series of inferences necessary to reach a conclusion directly

related to the issues in the case.[3] In addition, the introduction by the prosectuion of the bank's records, showing the existence of the account and a withdrawal of $800 at the time Newbold's testimony indicated the withdrawal occurred, suggests—but does not conclusively establish—that the inquiry would have been of minimal value. Under all of the circumstances, we cannot say that the district court deprived appellants of their constitutional right to test the accuracy of Newbold's direct testimony.

2. Use of recorded telephone conversations.

Appellants' second contention relates to reception into evidence and presentation to the jury of tape recorded telephone conversations between Newbold and appellants. Objection is also raised to permitting the jury, while listening to the tapes, to read what purported to be a written transcript of the conversation recorded on the tapes.

Newbold had reported to the Miami Police Department the alleged illegal transactions between himself and appellants. With Newbold's permission a monitoring device was installed on his telephone. Between April 15 and April 20 (when appellants were arrested), a number of phone calls between Newbold

[3] The line of logical inferences suggested by appellants is long: if Newbold could not satisfactorily explain the source of the money in the bank account, this permitted (but would not require) the inference that the money was not in the account; this permitted the inference that he did not have the $1,000 required for the initial payment; this in turn permitted the inference that he could not have made the payment, i.e., that his testimony on direct was incorrect.

and appellants were monitored and recorded on magnetic tape. A monitoring device also was placed in Newbold's apartment and a conversation among Newbold and all three appellants was monitored and recorded by three officers stationed in the apartment next door.

All tapes were taken to the United States Army Sound Laboratory at Washington, D.C., where copies of each were made and the originals returned. The copies were then run through a "noise suppressor" designed to remove background noises to make the conversations more audible, especially when the tapes were played at high volume.[4] Subsequently, over a four-day period, Lieutenant Malcolm Gracy of the Miami Police Department Internal Security Unit prepared a written transcript of the recordings. Gracy, who had known each appellant for a number of years (and Fountain for eighteen years), testified that he was easily able to recognize and distinguish among the voices on the tapes and that after playing the recordings repeatedly over the four-day period he was able to understand "most of" the conversations. He testified that the transcript accurately re-

[4] Concerning the function and operation of the noise suppressor, Sergeant Permer, Chief Broadcast Engineer at the U.S. Army Broadcast Studios (who had processed the tapes through the device), testified:

> "[T]he only thing we removed . . . was the noise between words. . . . [T]he noise suppressor's only function is to remove exactly what it says: noise . . . . [I]f a signal is coming through and a man stops talking or an individual stops talking and there is noise in the background, it removes this noise, but only this noise . . . . This at no time is affecting the original tape."

flected the audible portions of the recorded conversations.

When the tapes (both originals and copies) were offered into evidence an extended hearing was held out of the presence of the jury on their admissibility. The District Judge first listened to and compared the original recording and the copies which had been run through the noise suppressor. He then listened to the copies again while simultaneously following the written transcript prepared by Lt. Gracy. Both the original tapes and the copies relating to the phone calls were admitted; only the copy was played to the jury. The court found that none of the conversation had been filtered out, and appellants failed to respond to his request to demonstrate where any changes had been made. The tape of the apartment conversation was not admitted; noting the confused mixture of three or four voices and certain mechanical interference in the original recording, the court ruled that it could not be accurately determined whether the copy in fact accurately reproduced the conversations transcribed on the original.[5]

Lt. Gracy's transcripts were not admitted into evidence, but the jury was permitted to use them while the recordings were played. The trial judge indicated that he had determined for himself that the written version accurately reflected the recording, except for inaudible portions which were represented on the transcript by asterisks. Noting the inconvenience of

[5] One of the officers who monitored the conversation testified to its substance. No issue as to this testimony is raised before us.

frequently stopping the recording to permit a witness by oral testimony to identify the voice then speaking on the recording, the court ruled that the jury would be permitted to use the transcripts for the purpose of helping identify the speakers on the tapes. Appellants complain here of the introduction of the original tapes and of the copies and the use of the transcripts by the jury.

Appellants claim the recordings were obtained in violation of their Fourth Amendment rights and the introduction of originals and copies was error. This objection is without merit. In *Blanchard v. United States*, 360 F.2d 318, 320 (5th Cir., 1966) we held, "While there may be justification for a feeling of increasing distaste for the obtaining of evidence through listening to telephone conversations, ... listening to a telephone conversation between an informant (who gave his consent to the 'listening') and the appellant by a Government agent is not such an invasion of a constitutionally protected area as to be a violation of the Fourth Amendment." We do not think *Berger v. New York*, ... U.S. ...., ... S.Ct. ...., ... L.Ed. 2d .... [35 U.S.L.W. 4649] (1967) now requires a different conclusion. In *Berger*, the Court made clear that statements in *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928) to the effect that " 'a conversation passing over a telephone wire' cannot be said to come within the Fourth Amendment's enumeration of 'persons, houses, papers and effects' " are no longer valid and that a telephone conversation is within the protection of the Fourth Amendment. Use of electronic devices

to capture it is therefore a "search" within the meaning of the Amendment; the inquiry must be whether there has been an *unreasonable* search prohibited by the constitutional provision. The Court's citation with approval of *Lopez v. United States*, 373 U.S. 427; 83 S.Ct. 1381, 10 L.Ed. 2d 462, (1963) makes clear that *Berger* was not meant to hold unreasonable the interception of a telephone conversation with the permission of one party where there has been no unlawful physical invasion of a constitutionally protected area. Only six months earlier, Mr. Justice Stewart, speaking for the Court in *Hoffa v. United States*, 385 U.S. 293, ... S.Ct. ...., 17 L.Ed. 2d 374, 382 (1967) had commented, "Neither this Court nor any member of it has ever expressed the view that the Fourth amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[6] See also *Osborn v. United States*, ... U.S. ...., ... S.Ct. ...., 17 L.Ed. 2d 394 (1966). The recordings here involved were not

[6] See the concurring opinion of Mr. Justice Douglas in *Berger*, suggesting that if an individual unknowingly and because of the deception of the person to whom he speaks is "put . . . on the radio" and utters words used subsequently to convict him, the subject's Fourth *and Fifth* Amendment rights have been violated. 35 U.S.L.W. at 4656. The majority did not reach the Fifth Amendment question urged by the petitioner. No Fifth Amendment issue was urged upon us in this case, so we need not specifically rule upon the matter. But we note that in *Hoffa v. United States*, supra, the Court rejected the contention that testimony by a witness to damaging admissions made to him by the accused at a time when the witness, unknown to the accused, was a government informer violated the Fifth Amendment privilege against compulsory self incrimination:

> [N]o claim . . . could be made that the petitioners incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversations with Partin [the informer] and in Partin's presence were wholly voluntary. For that reason, if for no other, it is

obtained in violation of appellants' Fourth Amendment rights.

Objection is raised to the reception in evidence of the copies on the grounds that no justification was shown for not using the original tapes, and that the noise suppression process may have eliminated part of the conversation, thus making the copies unreliable. We hold it was not necessary for the government to establish a physical defect in the magnetic tape on which the original recording was made to support the admission of the copies.[7] The existence of a significant degree of background noise which might well have interfered with the jury's ability to understand the substance of the conversations, plus the availability of a reliable method of removing the interference by making a copy and running it through the noise suppression device sufficiently justify the admission and use of the copy. The District Court found, and it is not seriously disputed here, that the copy was an accurate reflection of the conversations transcribed on the original tape. Consid-

clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case.

17 L.Ed. 2d at 583. We feel that the same rationale applies when the challenged evidence is a recording of a conversation rather than the oral testimony of the other party to the conversation. See *United States v. Bena*, 333 F.2d 669 (2nd Cir.), cert. denied, 379 U.S. 880, 85 S.Ct. 147, 13 L.Ed. 2d 86 (1961); *Todisco v. United States*, 298 F.2d 208 (9th Cir., 1961), cert. denied, 368 U.S. 959, 82 S.Ct. 602, 7 L.Ed. 2d 527 (1962).

[7] See *Monroe v. United States*, 234 F.2d 49, 56 (D.C. Cir., 1956). There was some evidence that the tapes on which the original recording was made would stretch with extended playing but were not fragile to the extent that they would break after repeated use. We need not discuss whether this alone would have been sufficient justification for admission of the copies.

ering the strong showing here of the accuracy and reliability of the copy and its value in making the conversations more easily discernible, its admission was not error.[8]

Nor is appellants' objection to the use of the transcripts well taken. It is not seriously contended that the district court erred in its factual finding that Lt. Gracy accurately designated the speakers and correctly transcribed the words of the conversation. Unlike *Schanerman v. United States*, 150 F.2d 941 (3rd Cir., 1945) the record here contains an uncontested showing that Lt. Gracy was personally familiar with each of the parties to the recorded conversations and was able from experience to identify the voices. The jury was, somewhat belatedly, instructed to use the transcript for the limited purpose of identifying the voices.[9] But, it is asserted, it nevertheless

[8] Assuming but not deciding that the best evidence rule applies to recordings [a questionable assumption; see *Johns v. United States*, 323 F.2d 421 (5th Cir., 1963)], this holding does not run counter to the rule. It is clear that secondary evidence may be admitted where the original is too extensive for easy analysis (for example, an accurately prepared summary of extensive records) or where the original is illegible. See 4 Wigmore, *Evidence* §§ 1229, 1230 (3rd Ed., 1940). We have held that mechanical convenience for presentation to the jury is a sufficient ground to justify the introduction of a copy of a recording. In *Johns v. United States*, 323 F.2d 421 (5th Cir., 1963) an original wire recording was available but the volume could not be turned up loud enough for the jury to hear the recording. We affirmed the introduction of a copy, conceded to be accurate, in the form of a tape recording. Where a copy is proven accurate and serves to present the substance of the original in a more easily understood form, the spirit of the rule permits the admission of the copy. See generally, Ann., Admissibility of Sound Recordings As Evidence in Federal Criminal Trials, 10 L.Ed.2d 1169 (1964).

[9] During their deliberation the jury sent a message to the court asking that they be allowed to have the transcripts. Defense counsel requested, and government counsel opposed, a specific instruction at that time that the transcripts were not

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was error to permit use of the transcripts, however accurate they may have been, because this amounted to a prejudicial emphasis of the conversations, i.e., the cumulative effect of transcripts plus tape so emphasized the conversations that their probative value was inflated in the minds of the jurors. The task of the District Court was to weigh the danger of such over-emphasis against the inconvenience and confusion of stopping the tape between each speaker and permitting Lt. Gracy to identify the next speaker. We cannot say that he arrived at the wrong balance. Our conclusion is identical to that reached by the Fourth Circuit in a similar situation. *United States v. Hall*, 342 F.2d 849, 853 (4th Cir.), cert. denied, 382 U.S. 812, 86 S.Ct. 28, 15 L.Ed.2d 60 (965). *Cf. Lindsey v. United States*, 332 F.2d 688, 691-92 (9th Cir., 1964).

The judgment is AFFIRMED.

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part of the evidence in the case. In declining the request of the jury, the district judge stated:

> The transcripts were made and given to you at the time that you listened to the tapes for the purpose of identifying the persons who were speaking, and that was the only purpose the transcripts were made up for; [in regard to] the evidence that you listened to through the earphones, if we had not had the [transcripts] . . . it would have been necessary to stop at the end of every sentence to identify who the next speaker was . . . . [I]t is your recollection of the evidence that counts. It is going to be up to you to use your best powers of recollection with respect to the evidence.

While the better practice would have been to make clear to the jury at the time they were handed the transcripts the limited purpose for which the transcripts were being provided, we feel that the refusal to allow the jury to have the transcripts and the instruction then given adequately covered the matter.

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23220

D. C. Docket No. CR-65-311-DD

MARION FRANCIS FOUNTAIN and ROOSEVELT TREMBLE,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM and GODBOLD, Circuit Judges and McRAE, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 9, 1967

Issued as Mandate:

APPENDIX D

[736-737] Godbold

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
JAN 8 1968
EDWARD W. WADSWORTH
CLERK

NO. 23,220

MARION FRANCIS FOUNTAIN and ROOSEVELT TREMBLE,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

NO. 23,238

EUGENE J. MARSHALL,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

---

January 8,1968)

ON PETITIONS FOR REHEARING

Before WISDOM AND GODBOLD, Circuit Judges and McRAE, District Judge

PER CURIAM:

The petitions of the appellants for rehearing are DENIED.

Judges Wisdom and McRae have concurred.

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FILED
MAR 14 1968
JOHN F. DAVIS, CLERK

No. 1109

In the Supreme Court of the United States

OCTOBER TERM, 1967

EUGENE J. MARSHALL, MARION FRANCIS FOUNTAIN AND ROOSEVELT TREMBLE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG
ROGER A. PAULEY
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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293-334—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1109

EUGENE J. MARSHALL, MARION FRANCIS FOUNTAIN AND ROOSEVELT TREMBLE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 384 F. 2d 624.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1967. A timely petition for rehearing was denied on January 8, 1968. On February 7, 1968, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to February 14, 1968, and on February 12, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper to admit evidence of conversations overheard by the use of electronic recording devices placed on an informer's telephone and in his premises with his consent.

2. Whether the trial judge properly admitted into evidence copies of the original tape recordings of the conversations between petitioners and the informer which had been processed through a noise suppressor, and whether he properly permitted the jurors to follow the conversations with copies of an accurate transcript of the tapes.

3. Whether petitioners' convictions should be reversed because the informer invoked his privilege against self-incrimination during cross-examination.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiring to violate the narcotics laws and to bribe a public official. In addition petitioner Marshall, a former federal agent, was convicted on four counts of soliciting and accepting bribes, and the other petitioners were convicted, on certain of those counts, of aiding and abetting Marshall. On November 16, 1965, petitioners Fountain and Tremble were sentenced to five years' imprisonment on the conspiracy charge and to fifteen years' imprisonment on the bribery charges, the sentences to run concurrently and to be subject to the provisions of 18 U.S.C. 4208(a)(2). On April 1, 1966, petitioner Marshall was

sentenced to four years' and seven months' imprisonment on the conspiracy charge and to fourteen years' and seven months' imprisonment on each of the other counts, the sentences to run concurrently and to be subject to the provisions of 18 U.S.C. 4208(a)(2).[1]

Petitioner Marshall was the former agent-in-charge of the Miami, Florida, office of the Federal Bureau of Narcotics. Petitioners Fountain and Tremble were, respectively, a sergeant and an officer with the Miami police department assigned to narcotics enforcement (Tr. 38, 316–319, 1033).[2]

The evidence, the sufficiency of which is not challenged, showed that petitioners conspired among themselves and with one Newbold (named in the indictment as a co-conspirator) to provide "protection" for Newbold in his illicit narcotics activities. Newbold, who was the principal witness for the government, testified that beginning in late June or early July 1964 and extending into 1965 he made numerous payments totalling several thousand dollars to petitioners in accordance with their "protection" agreement. (Tr. 48–56, 62–63, 65–66, 69–83).[3]

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[1] Earlier, Marshall's sentence had been deferred and he had been committed pursuant to the provisions of 18 U.S.C. 4241 *et seq.* until certified to be mentally competent.

[2] "Tr." refers to the transcript of proceedings at trial, a copy of which is lodged with the Clerk of this Court.

[3] One Fowler also testified for the government, corroborating Newbold's evidence. Fowler came to Miami in January 1965. He arranged with Marshall to have a narcotics charge pending against him in Miami dismissed and later became a partner with Newbold, participating in the payments to petitioners (see Tr. 86–88, 517–521, 527–544).

ARGUMENT

1. On April 13, 1964, Newbold communicated with Lieutenant Gracy of the Miami police department and advised him of the illegal scheme. As a result, a monitoring device was placed on Newbold's telephone—with his permission—from April 15 to April 20, 1965 (the date of petitioners' arrest). Records of telephone calls between Newbold and petitioners obtained by the use of this device were admitted into evidence. (Tr. 137, 696–714, 838–901). In addition, an electronic listening device was placed in Newbold's apartment with his permission. Federal agents and local police officers testified, in corroboration of Newbold's testimony (Tr. 138–142), about an incriminating conversation in Newbold's apartment between Newbold and petitioners on April 20, 1965, which was overheard by means of this device. (Tr. 143, 793–799, 922–923, 977–978, 995–1000, 1020–1026).

Relying on *Katz* v. *United States*, 389 U.S. 347, petitioners contend that the evidence concerning the monitored conversations was inadmissible because the police officers did not obtain a warrant before using the electronic overhearing instruments. However, *Katz* holds only that prior judicial authorization is required when neither party has consented to the monitoring and the parties have not spoken in such a place or manner as to have exposed their words to the public ear.[4] That ruling has no application to situations such as the present, where one party to the conversation has given his consent that his conversation

[4] See the government's memorandum in *Long* v. *United States*, No. 1001, this Term, certiorari denied, March 4, 1968.

be monitored. See *Rathbun* v. *United States,* 355 U.S. 107. Where consent has been given, the situation is no different from that in which a person unwisely makes incriminating admissions to one who, unknown to him, is an informer. In such a case, the source of the criminal's undoing is not any unwarranted intrusion by the government into a right of privacy protected under the Fourth Amendment, but rather the criminal's misplaced confidence in the person to whom he has entrusted the information. See, *e.g., Hoffa* v. *United States,* 385 U.S. 293. This Court has recognized that the risk of disclosure of incriminating information, which petitioners voluntarily assumed, is not materially enlarged merely because law enforcement officers have taken precautions, with the informer's permission, to insure the accurate reproduction in court of the incriminating conversations, whether by mechanical recordation or transmittal to other listeners. *Lopez* v. *United States,* 373 U.S. 427; see *On Lee* v. *United States,* 343 U.S. 747.

2. In addition to the original tapes of the recorded conversations, the trial judge admitted into evidence copies of the tapes which had been processed through a noise suppressor to remove background noise (Tr. 834). These tapes were played for the jury, which was permitted to follow the conversations with the aid of transcripts of the tapes indicating the identity of the different speakers, which had been prepared by Lieutenant Gracy. Lieutenant Gracy testified that he had known each of the petitioners for a number of years and was readily able to identify their voices (Tr. 690, 715–716). Prior to admitting the copies and permit-

ting the jury to be furnished with the transcripts, the trial judge satisfied himself, through repeated comparisons of the transcripts and copies with the original tapes, that the copies and the transcripts were accurate reproductions of the original recordings (see Tr. 820–827). Petitioners do not challenge that finding.

In these circumstances, there is no merit to the contention that the processed copies were improperly received in evidence. Since the copies were accurate and had an obvious value in making the conversations more intelligible to the jury through the elimination of interfering noise, common sense supported their admissibility as a matter of sound judicial discretion. *Johns* v. *United States,* 323 F. 2d 421 (C.A. 5); *United States* v. *Hall,* 342 F. 2d 849 (C.A. 4); see *Monroe* v. *United States,* 234 F. 2d 49 (C.A.D.C.), certiorari denied, *sub nom. Smith* v. *United States,* 352 U.S. 872.

Nor is there merit to petitioners' argument that the decision to let the jurors utilize the transcripts unduly emphasized the importance of the conversations. As the court of appeals held, the question was one for the exercise of the trial judge's discretion after weighing that possibility against the confusion and inconvenience that would result if the playing of the tapes were to be repeatedly interrupted to permit Lieutenant Gracy to identify the respective speakers. *United States* v. *Hall, supra.* Since the jury was informed during its deliberations that the transcripts were not in evidence and had been supplied solely to enable them to follow more easily the conversations on the tapes (see Pet. App. D, 13–14, n. 9), no prejudice to petitioners resulted from the procedure.

3. (a) During Newbold's cross-examination, defense counsel elicited the fact that, following petitioners' arrests, Newbold had traveled to Kentucky, New Jersey, Canada and other places (Tr. 172–173). When Newbold was asked where he had obtained the money to finance his travels, he refused to answer. The trial judge, on being asked to rule on the refusal, inquired whether Newbold was refusing to answer on the grounds of possible self-incrimination (Tr. 176). After Newbold replied in the affirmative, defense counsel continued his cross-examination, without returning to the subject or waiting for the ruling previously sought.

In these circumstances, the court of appeals properly held that petitioners' right to cross-examine had not been impermissibly restricted. The subject of Newbold's travels following petitioners' arrests had not been raised during his direct examination. The question of his source of funds for those travels was plainly a collateral inquiry on which Newbold had the right to invoke his Fifth Amendment privilege. Thus even had defense counsel moved to strike Newbold's testimony, the trial judge would have been justified in denying the motion, since Newbold's refusal to answer did not substantially impair the ability of petitioners to test the truth of his testimony.[5] *E.g., United States* v. *Cardillo,* 316 F. 2d 606 (C.A. 2), certiorari denied, 375 U.S. 822; *Smith* v. *United States,* 331 F. 2d 265 (C.A. 8), certiorari denied, 379 U.S. 824.

[5] The question of Newbold's credibility was already before the jury, since he had admitted to three prior convictions (Tr. 51; see Tr. 177–178), in addition to his self-admitted complicity in the instant conspiracy.

(b) Newbold testified on direct examination that petitioner Fountain first approached him in the latter part of June 1964 with a request for $1000, assuring Newbold of city and state protection for his illegal activities and implying federal protection (Tr. 48–52). Several days later, Fountain telephoned Newbold and made an appointment to see him at his house. Newbold had his wife draw $800 or $900 from her bank account, and he gave $840 to Fountain, promising him an additional $160 (Tr. 54–55, 206). Evidence was later introduced reflecting a withdrawal of $800 from Mrs. Newbold's account about the time indicated (Tr. 320–325, 334).

On cross-examination of Newbold, defense counsel asked how Newbold had acquired the money with which to make the initial payment (Tr. 218). Newbold refused to answer on Fifth Amendment grounds. Defense counsel did not request a ruling by the trial judge but instead immediately continued his cross-examination with questions on unrelated matters (Tr. 219).

Petitioner contends that the trial court erred in not requiring Newbold to disclose the source of the funds with which he made the original payment. However, Newbold had not waived his privilege through previous incriminating testimony as to the matter sought to be explored, and he was, therefore, entitled to invoke the Fifth Amendment as a ground for refusal to answer. Compare *Rogers* v. *United States*, 340 U.S. 367.

Since defense counsel did not move to strike any portion of Newbold's testimony and, in fact, made no

objection to the fact that Newbold had been allowed to invoke his privilege, the situation here is not like that in *United States* v. *Cardillo,* 316 F. 2d 606, 611–613 (C.A. 2), certiorari denied, 375 U.S. 822, where the denial of a motion to strike a witness' testimony regarding the source of $5,000 with which he had made a single payment for stolen furs was held to be reversible error. In *Cardillo*, the court characterized the witness' testimony as comprising "practically the entire case" against the two defendants whose convictions were reversed. 316 F. 2d at 611. Here, on the other hand, Newbold had testified to a series of payments to petitioners, and his testimony was corroborated by his partner Fowler, who was present when some of the payments were made (see note 3, *infra*), and by the recordings of petitioners' conversations, which also showed the existence of the conspiracy. Moreover, in *Cardillo* the court pointed out that there was good reason to suspect that the witness never had the $5,000 (316 F. 2d at 612), whereas here the records of Mrs. Newbold's bank account reflected a withdrawal of $800 at about the time Newbold testified he made the $840 payment to Fountain. The court's conclusion, on these facts, that no substantial right of petitioners was infringed by Newbold's invocation of his privilege is clearly correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

MARCH 1968.

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